NO. 80771-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN L. HALE AND ROBBIN HALE,

Appellants,

vs.

WELLPINIT SCHOOL DISTRICT NO. 49,

Respondent

MOTION FOR DISCRETIONARY REVIEW

Paul J. Burns
WSBA No. 13320
Paul J. Burns, P.S.
Paulsen Center
421 West Riverside, Suite 610
Spokane, WA 99201
(509) 327-2213

A. IDENTITY OF PETITIONER

Petitioners John L. Hale and Robbin Hale, plaintiffs below, ask the court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioners seek discretionary review by this court of the Order of the Stevens County Superior Court dated September 21, 2007, Denying Plaintiff's Motion for Reconsideration. The Stevens County Superior Court affirmed its prior Order Granting Defendant's Motion for Partial Summary Judgment and dismissing plaintiff's claim of disability discrimination under RCW 49.60.180. In denying Plaintiff's Motion for Reconsideration, the Superior Court held that the definition of disability set forth in RCW 49.60.040(2)(25), enacted by the legislature effective July 1, 2007, did not apply retroactively to this case, contrary to the express language of RCW 49.60.040(3). The court applied the definition of "disability" adopted by the Supreme Court in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.2d 844 (2006), and held that plaintiff Hale did not have a disability for purposes of his disability discrimination claim under the Washington Law Against Discrimination (WLAD). A copy of the trial court's Order Denying Plaintiff's Motion for Reconsideration is in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the definition of "disability" adopted by the legislature in RCW 49.60.040(2)(25), effective July 1, 2007, applies retroactively to plaintiff's claim of disability discrimination which arose between August 2002 and March 2003?

2. Whether plaintiff John Hale had a disability under RCW 49.60.180 while he was employed with the Wellpinit School District from August 2002 through March 2003?

3. Whether the record demonstrates genuine issues of material fact concerning whether defendant Wellpinit School district breached its duty to accommodate plaintiff's disability between August 2002 and March 2003?

D. STATEMENT OF THE CASE

Plaintiff John Hale brought this lawsuit against his former employer, the Wellpinit School District, alleging three separate causes of action: (1) disability discrimination under RCW 49.60.180, (2) negligent infliction of emotional distress, and (3) breach of contract. On December 28, 2006, defendant moved for partial summary judgment, seeking dismissal of plaintiff's claim of disability discrimination. Defendant argued that Mr. Hale did not have a disability under the definition of that term adopted by the

Supreme Court in *McClarty v. Totem Electric International,* 157 Wn.2d 214, 137 P.3d 844 (2006). On May 3, 2007, the Stevens County Superior Court entered an Order Granting Defendant's Motion for Partial Summary Judgment, and dismissing plaintiff's disability discrimination claim.

In April 2007, the legislature passed Senate Bill 5340, enacting a comprehensive definition of disability for purposes of the Washington Law Against Discrimination. The legislature expressly rejected the definition of disability adopted by the court in *McClarty* and provided for retroactive application of the legislative definition of disability:

> This act is remedial in nature and retroactive, and applies to all causes of action occurring before July 26, 2006, and to all causes of action occurring on or after the effective date of this act.

RCW 49.60.040(3). Senate Bill 5340 went into effect on July 1, 2007.

Plaintiff moved for reconsideration of the trial court's Order Granting Summary Judgment dismissing his disability discrimination claim. Plaintiff argued that the record demonstrated he had a disability, as that term was defined in Senate Bill 5340. The trial court denied Plaintiff's Motion for Reconsideration, holding that the separation of powers doctrine precluded retroactive application of the definition of disability adopted by the legislature

in Senate Bill 5340. Plaintiff now seeks discretionary review of the trial court order denying his motion for reconsideration.

1. Factual Background

Plaintiff John Hale was originally hired by the Wellpinit School District in February 2002. He was initially hired to provide technical support for the District's computer system. Subsequently, Mr. Hale was assigned to the Wellpinit Alliance Program at Fort Simcoe, outside of White Swan, Washington.

By late summer 2002, Mr. Hale was experiencing significant difficulties in his work environment. On August 25, 2002, Hale wrote to Wellpinit Superintendent Reid Reidlinger, and explained that the working environment was having significant adverse effects on his health. Plaintiff's August 25, 2002 letter advised Mr. Reidlinger that the workplace environment was making him physically ill, and he was seeking medical attention. Mr. Hale asked Mr. Reidlinger to intervene (engage in the interactive process). (See Hale deposition, Exhibit 12, Appendix B). Mr. Reidlinger ignored him.

Mr. Hale's health condition continued to deteriorate and he sought medical attention. On December 22, 2002, his treating physician, Dr. Robert

Wigert, directed a letter, "To Whom it May concern," which stated that Hale suffered from anxiety and depression, and that his condition was aggravated by the workplace environment. (Hale Deposition, Exhibit 15, Appendix C). Mr. Hale provided Dr. Wigert's letter to Superintendent Reidlinger, and the Wellpinit School board, with a cover letter dated January 3, 2003. (Hale deposition, Exhibit 15, Appendix D). Defendant did not respond, and made no effort to engage in an interactive process to explore reasonable accommodation for Mr. Hale.

Finally, suffering from continued deterioration in his health, and having received no response from the District, Mr. Hale presented the District with another report from his physician dated February 17, 2003. Dr. Wigert stated "Mr. Hale is no longer able to continue in his present employment due to the effects of the employment on his health issues." (Deposition of Reid Reidlinger, Exhibit 5, Appendix E).

Mr. Hale then brought this lawsuit alleging claims of disability discrimination under RCW 49.60.180, negligent infliction of emotional distress, and breach of contract. On May 3, 2007, the Stevens County Superior Court granted Defendant's Motion for Partial Summary Judgment, dismissing plaintiff's disability discrimination claim. Relying on *McClarty*

v. Totem Electric, supra, the court held that Mr. Hale did not have a disability for purposes of his WLAD claim. (See March 30, 2007 letter opinion, Appendix F).

The legislature rejected the *McClarty* court's definition of disability for purposes of WLAD claims by enacting Senate Bill 5340, effective July 1, 2007. Plaintiff moved for reconsideration of the summary judgment order dismissing his WLAD claim, arguing that he met the definition of disability adopted by the legislature in Senate Bill 5340. The legislature expressly provided for retroactive application of the newly enacted definition of disability. RCW 49.60.040(3). Despite this legislative directive, the trial court held that the separation of powers doctrine precluded retroactive application of the definition of "disability" in Senate Bill 5340. The trial court denied Plaintiffs' Motion for Reconsideration, and affirmed its summary judgment dismissal of the disability discrimination claim. (See letter opinion dated August 27, 2007, Appendix H). The Court's Order Denying Reconsideration provides in relevant part:

> The Court further finds that the issue involved in the Motion for Reconsideration involves a significant question of law under the Constitution of the State of Washington, for which immediate discretionary review would be appropriate. Specifically, the Court

> finds that the issue of whether the amended definition of "disability" contained in RCW 49.60.040(25) should be applied retroactively, or whether the same violates constitutional considerations (i.e., the separation of powers doctrine), presents a significant question of law under the Constitution of the State of Washington, for which immediate discretionary review would be appropriate.
>
> In addition, the Court finds that the issue of whether RCW 49.60.040(25)'s definition of "disability" applies retroactively involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of this Order may materially advance the ultimate termination of this litigation.

(Order Denying Plaintiff's Motion for Reconsideration, p. 2)

Plaintiff now seeks discretionary review by the Supreme Court of the Stevens County Superior Court Order Denying the Motion for Reconsideration, and affirming dismissal of his disability discrimination claim under the WLAD.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 2.3 (b)(4) provides:

> Except as provided in section (d), discretionary review may be accepted only in the following circumstances:
>
> ...

> (4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

The requirements of RAP 2.3(b) (4) are clearly met in this case. Petitioner requests the court to grant discretionary review.

1. The order denying Plaintiff's Motion for Reconsideration involves a controlling question of law as to which there is substantial ground for a difference of opinion.

Plaintiff Hale filed this lawsuit in Stevens County Superior Court on April 24, 2006 alleging claims of, inter alia, disability discrimination under RCW 49.60.180. At the time he filed suit the WLAD did not define the term "disability." *McClarty* at 222. At the time the suit was filed, the Supreme Court had defined the term "disability," for purposes of reasonable accommodation claims under the WLAD, as a sensory, mental, or physical abnormality that has/had a substantial limiting effect upon the individual's ability to perform his or her job. *Pulcino v. Federal Express*, 141 Wn. 2d 629, 641, 9 P. 3d 787 (2000). An employee could also show that he has a sensory, mental, or physical abnormality, by showing that he had a condition that is medically cognizable or diagnosable, or exists as a record or history.

Id., citing *Phillips v. City of Seattle*, 111 Wn. 2d 903, 906-907, 766 P. 2d 1099 (1989); WAC 162-22-020 (2).

On July 6, 2006, the Supreme Court decided *McClarty v. Totem Electric,* supra, dramatically altering its prior jurisprudence with respect to disability discrimination claims under the WLAD. The court adopted the definition of disability set forth in the Americans with Disabilities Act, 42 U.S.C. Section 12101-12209:

> To provide for a single definition of "disability" that can be applied consistently throughout the WLAD, we adopt the definition of disability as set forth in the federal Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. sec.sec. 12101-12209. We hold that a plaintiff bringing suit under the WLAD establishes that he has a disability if he has (1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment.

157 Wn. 2d, at 220.

In response to the *McClarty* decision the legislature enacted Senate Bill 5340, and defined disability as follows:

(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

(I) Is medically cognizable or diagnosable; or

(ii) Exists as a record or history; or

(iii) Is perceived to exist whether or not it

exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or

her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

The legislature made its intention clear. RCW 49.60.040 (1) provides:

> The legislature finds that the Supreme Court, in its opinion in *McClarty v. Totem Electric*, 157 Wn. 2d 214, 137 P. 3d 844 (2006), failed to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.

Further, RCW 49.60.040 (3) provides:

> This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act.

Despite this legislative directive, the trial court in the instant case held that the separation of powers doctrine precluded retroactive application of the definition of disability adopted by the legislature in Senate Bill 5340.

Since this legislation was enacted state and federal courts throughout the state have considered whether the new statutory definition of disability applies retroactively to disability discrimination claims pending under the WLAD. Trial courts are divided on this issue. In *Breeden v. Kaiser Aluminum Corp.*, 2007 WL 1461290 (E.D. Wash., 2007), the court held that Senate Bill 5340 applied retroactively because it was predominantly remedial and did not affect a substantive or vested right. Similarly, in *Delaplaine v. United Airlines*, No C06-0989Z (W.D. Wash, 2007), the federal trial court, sitting in the Western District of Washington held that retroactive application of Senate Bill 5340 does not violate the separation of powers doctrine. (See Appendix G) However, in *Varga v. Stanwood Camano School District*, No C06-178 MJP (W.D. Wash., 2007), a different trial judge in the Western District reached the opposite conclusion and held that retroactive application of Senate Bill 5340 violated the separation of powers doctrine. (Appendix I)

In the instant case, the trial court's Order Denying Plaintiff's Motion for Reconsideration certified "that the issue of whether the amended

definition of "disability" contained in RCW 49.60.040 (25) should be applied retroactively, or whether the same violates constitutional considerations (i.e., the separation of powers doctrine), presents a significant question of law under the Constitution of the State of Washington, for which immediate discretionary review would be appropriate." (Order, at p.2) The decision of the federal trial courts in *Breeden*, *Varga,* and *Deleplaine* confirm that there is substantial ground for differences of opinion on this issue. The requirements of RAP 2.3 (b) (4) are met, and petitioner respectfully requests this court to accept discretionary review.

2. Immediate review of the trial court Order will materially advance the ultimate termination of the litigation.

The second prong of RAP 2.3 (b) (4) provides that discretionary review is appropriate if it "may materially advance the ultimate termination of the litigation." Again, the trial court's Order Denying Plaintiff's Motion for Reconsideration expressly certifies this to be the case:

> In addition, the court finds that the issue of whether RCW 49.60.040 (25)'s definition of "disability" applies retroactively involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of this Order may materially advance the ultimate termination of this litigation.

(Order at p. 2)

This is clearly the case. It is inevitable that the court's ruling dismissing plaintiff's claim under the WLAD will be appealed. It would unduly prolong the litigation, and waste the resources of the parties and the court, to require this case to proceed to trial on the remaining common law claims when an appeal of the WLAD claim is inevitable. Resolution of this important issue regarding the applicable definition of disability for WLAD claims arising prior to the effective date of Senate Bill 5340 will materially advance the ultimate termination of this litigation. It will also provide much needed guidance to trial courts throughout the state wrestling with this issue.

F. CONCLUSION

Petitioner respectfully requests the court to accept review of the trial court's Order Denying Plaintiff's Motion for Reconsideration, and hold that Senate Bill 5340 applies retroactively to this case, consistent with the directive and mandate of the legislature.

RESPECTFULLY SUBMITTED this 30 day of October, 2007.

PAUL J. BURNS, P.S.

By: _____
PAUL J. BURNS
WSBA No. 13320
Attorney for Petitioners

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF STEVENS

JOHN L. HALE and ROBBIN HALE, husband and wife,

Plaintiffs,

vs.

WELLPINIT SCHOOL DISTRICT NO. 49, a Municipal corporation,

Defendant.

No. 06-2-00194-8

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

THIS MATTER came before the above-entitled Court for hearing on May 29, 2007, on Plaintiffs' Motion for Reconsideration. Defendant Wellpinit School District No. 49 appeared through its attorney Michael E. McFarland, Jr. Plaintiffs appeared through their attorney Paul Burns. The Court considered the arguments of counsel, the records and files herein, and specifically the following:

1. Plaintiffs' Motion for Reconsideration;

2. Plaintiffs' Memorandum of Authorities in Support of Motion for Reconsideration;

3. Defendant's Memorandum in Opposition to Plaintiff's Motion for Reconsideration;

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

4. Plaintiffs' Reply Memorandum in Support of Motion for Reconsideration;

5. Defendant's Supplemental Memorandum in Opposition to Plaintiffs' Motion for Reconsideration;

6. August 3, 2007 letter from Michael McFarland, with attachment;

7. Plaintiff's Statement of Additional Authorities Re: Constitutionality of RCW 49.60.040(25);

8. Defendant's Memorandum in Response to Plaintiff's Statement of Additional Authorities Re: Constitutionality of RCW 49.60.040(25);

9. Affidavit of Michael E. McFarland, Jr. (dated August 28, 2007), with attachments;

10. Affidavit of Michael E. McFarland, Jr. (dated August 29, 2007), with attachments;

Having reviewed the foregoing records and files, and having heard the argument of counsel, the Court finds that Plaintiffs' Motion for Reconsideration should be denied.

The Court further finds that the issue involved in the Motion for Reconsideration involves a significant question of law under the Constitution of the State of Washington, for which immediate discretionary review would be appropriate. Specifically, the Court finds that the issue of whether the amended definition of "disability" contained in RCW 49.60.040(25) should be applied retroactively, or whether the same violates constitutional considerations (i.e., the separation of powers doctrine), presents a significant question of law under the Constitution of the State of Washington, for which immediate discretionary review would be appropriate.

In addition, the Court finds that the issue of whether RCW 49.60.040(25)'s definition of "disability" applies retroactivity involves a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of this Order may materially advance the ultimate termination of this litigation.

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane. WA 99201-0910
(509) 455-5200; fax (509) 455-3632

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT Plaintiffs' Motion for Reconsideration is GRANTED.

DONE IN OPEN COURT this 21 day of Sept, 2007.

Rebecca M. Baker

JUDGE REBECCA M. BAKER

Presented by:

EVANS, CRAVEN & LACKIE, P.S.

By: _____
MICHAEL E. MCFARLAND, JR., WSBA No. 23000
Attorneys for Defendants

Approved as to Form;
Notice of Presentment Waived:

Paul J. Burns, P.S.

By: Telephonic Approval 09-12-2007
PAUL J. BURNS, WSBA No. 13320
Attorney for Plaintiffs

Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

APPENDIX B

John Hale
PO Box 678
White Swan, WA 98952

August 25, 2002

Reid Riedlinger
PO Box 390
Wellpinit, WA 99040

Dear Reid:

This letter is written to clarify the difficulties Magne, Chris and I are having. Magne is my supervisor, and I know I am supposed to accept whatever behavior he exhibits, but the situation is getting very difficult for me.

My comfort zone in computers is with Microsoft Products. I have no experience working with Novell servers, but they can't be much different than other servers I have worked with. All I need is a little practice and education in the Novell server, and I will know what I am doing. For some reason, Magne has given minimal information about the Novell software. In fact, he and Chris go out of their way to make sure I don't know or see what they are doing, so I will be absolutely dependent on them. How can this site ever become self-sufficient with this attitude?

At the same time, Magne has been arrogant and disrespectful to me throughout the last six months. He blames me for most of the classroom computer problems saying they occur because I am there. He seems to wait for any misstatement, just to have a chance to say or imply that I am stupid or ignorant. He takes every suggestion I make as an insult and belittles and insults me, as if it brings pleasure for him. In the last few weeks, insults have increased to almost every phone call. He even called me a "liar," which elicited a lot of anger in me.

His attacks, almost always over the phone so no one else can hear, have begun to bother me physically, in that I become nauseated when I talk to him. My stomach aches for hours after phone conversations, and after the worst calls, I have trouble sleeping. His abuse seems to be intended to get me to quit my position, but I am very excited about our project and really want this high school to be successful.

The confrontation in front of the Alliance group was unfortunate, because my ethical standards would not let me discuss the abuse in a group situation. I feel I suffered more degradation, because of his remarks there.

I am making a appointment with the doctor to get something for the nausea and pain, but it takes a long time to get an appointment. Therefore, I am asking that you talk with me about the problems when you visit this week. I believe a respectful meeting could be set up to resolve the issues, and we can talk about that.

Thank you for listening.

Sincerely,

John

Exhibit 12

APPENDIX C

icians Clinic
of Spokane

Internal Medicine
Endocrinology
Gastroenterology
Infectious Disease
Pulmonary
Rheumatology
Nephrology

December 20, 2002

RE: John L. Hale
DOB: 07/21/1946

To Whom It May Concern:

Mr. John Hale is a patient that I saw in April of 2002 for the first time. He is a 56-year-old gentleman that suffers from anxiety disorder and depression.

When I first saw Mr. Hale in April, he seemed to be fairly stable on his regimen of Zoloft and BuSpar. Subsequent to that time he has had increasing problems with depression and anxiety and I have had to add another medication, Wellbutrin, with increasing doses.

At this point John feels the major stress in his life is job related. He attributes this to difficulties with his direct supervisor, who he feels treats him in a very unprofessional manner. When his anxiety attacks become prominent he has physical symptoms of chest pain and nausea.

Sincerely,

Robert D. Wigert, M.D.

RDW/pdm

Fifth Avenue
okane, WA 99204
)9) 624-0111
)9) 623-1326

APPENDIX D

John Hale
PO Box 678
White Swan, WA 98952
Business Technology Classroom Phone (509) 874-2244 Ext. 260
robbinnmolly@aol.com

January 3, 2003

Eugene Payne
School Board, Position 1
Wellpinit School District # 49
HCR 1, Box 324
Wellpinit, WA 99040

Derek Wynne
School Board, Position 2
Wellpinit School District # 49
PO Box 82
Wellpinit, WA 99040

Jami Peone, Chairman
School Board, Position 3
Wellpinit School District # 49
PO Box 277
Wellpinit, WA 99040

Monty Ford Sr.
School Board, Position 4
Wellpinit School District # 49
PO Box 287
Wellpinit, WA 99040

Mike Seyler
School Board, Position 5
Wellpinit School District # 49
PO Box 303
Wellpinit, WA 99040

Dear Board Members:

I am writing this letter to you, because Mr. Riedlinger has not responded to my previous efforts to discuss what I think is abusive treatment by Wellpinit staff and working conditions that have resulted in severe medical problems for me. In addition, I am concerned about the treatment of Wellpinit Alliance High School students, and the disrespect shown to Fort Simcoe Job Corps.

In order to fully understand the current conditions at Fort Simcoe, without me going into great detail in this letter, I am requesting that the Board send someone with the authority necessary to investigate and assess the following:

- The disrespectful way I have been treated by Wellpinit staff, which has affected my health and health care costs, probably for the rest of my life. (See enclosed letter from Dr. Robert Wigert, my attending physician);
- The lack of documentation about students that have been expelled and forced out of the high school program;
- The lack of effective discipline policies and procedures;
- The lack of transcripts for students no longer in the high school;

JH 1.4.15

- The communication and decision making policies in relation to the Alliance program;
- The uncooperative attitude toward the established Fort Simcoe Job Corps procedures designed to maximize student achievement and development;
- The facts regarding the graduation of Rosalie Ortega;
- The facts regarding the forced expulsion of Lolita Lopez;
- The discrimination complaint initiated by Tyree Williams and his subsequent treatment;
- The lack of support for the Wellpinit Alliance Business Technology class; and
- The salary guidelines for vocational instructors.

I am also requesting that the Board adopt standards in regard to:

- Minimum standards for students to earn a high school credit;
- Procedures for expelling or removing students from the high school program;
- Timely and effective surveys from students and staff about the effectiveness of the instructors and effectiveness of the Wellpinit Alliance program; and
- Qualifications for management personnel.

I am sorry I have been forced to take this step, but I believe Wellpinit School District risks losing its good reputation due to the current situation.

Respectfully,

John Hale

CC: Roger "Reid" Riedlinger
Enclosure

APPENDIX E

The Physicians Clinic
of Spokane

Internal Medicine
Endocrinology
Gastroenterology
Infectious Disease
Pulmonary
Rheumatology
Nephrology

February 17, 2003

RE: John L. Hale
DOB: 07/21/1946

To Whom It May Concern:

Mr. John Hale is no longer able to continue his present employment due to the effects of the employment on his health issues. Because the job situation is worsening his health, he is going to be quitting the job.

If you need further information, with appropriate releases it will be provided.

Sincerely,

Robert D. Wigert, M.D.

RDW/pdm

801 West Fifth Avenue
Suite 416
Spokane, WA 99204
(509) 624-0111
(509) 623-1326

Riedlinger
EXHIBIT NO. 3

APPENDIX F

Superior Court of the State of Washington
For Stevens, Pend Oreille and Ferry Counties
Stevens County Courthouse - Colville
Pend Oreille County Hall of Justice - Newport
Ferry County Courthouse - Republic

Rebecca M. Baker, Judge
Department 1

Allen C. Nielson, Judge
Department 2

Evelyn A. Bell
Court Administrator

Mailing Address:
215 S. Oak, Suite 209
Colville, WA
99114-2861

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Mr. Paul J. Burns, P.S.
Attorney at Law
One Rock Pointe
1212 N. Washington, Suite 224
Spokane, WA 99201-2400

Mr. Michael E. McFarland, Jr.
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910

Gentlemen:

Re: *Hale v. Wellpinit School District*
Stevens County No. 2006-2-00194-8

Thank you both for your patience in receiving my decision on the defendant's motion for partial summary judgment in the above matter. I have now had the opportunity to review some of the cases that I was concerned about being sure to read before giving you a decision on this issue.

I would now grant the motion. For the sake of brevity I will just say that I believe that there is not a genuine issue of material fact that Mr. Hale was "disabled" under the definition we are required to use pursuant to *McClarty v. Totem Electric,* 157 Wn.2d 214, 222 (2006). Specifically, it is undisputed that his anxiety and depression conditions did not render him substantially unable to perform a major life activity, either sleep or work, as claimed. Rather, it is undisputed that his inability to work was related to conflicts with particular individuals in this particular job and not to his anxiety and/or depression conditions. First, he has made no showing of a "substantial" effect upon his sleep, as would be required in relation to sleep as a major life activity. *See, e.g., Scheerer v. Potter,* 443 F.3d 916, 920(7th Cir. 2006). Nor was he rendered by his anxiety and/or depression conditions to be unable to work in a broad class of jobs, as is minimally required to establish a disability under the law. *See Sutton v. United Airlines,* 527 U.S. 471, 491 (1999); *Doren v. Battle Creek Health Sys.,* 187 F.3d 595, 597 (6th cir. 1999).

Finally, I find that, assuming for the sake of argument that he was "disabled" under the restrictive definition that we must work with in this context, then his request for the District superintendent to intervene in some fashion could not be viewed as a request for accommodation. *See, e.g., Davis v. Microsoft Corp.,* 109 Wn.App. 884, 892 (2002).

Accordingly, I would ask that Mr. McFarland prepare the necessary order, pursuant to CR 56(h), and present it to Mr. Burns for approval as to form before getting it to me for signature. For your information, I will be away from the office on vacation until April 16, so I will be unable to sign the order until I return. For purposes of any motion for reconsideration, the entry of the order will be considered to be when I actually sign the order, not the date of this letter.

Again, thank you both for your patience in receiving this decision.

Very truly yours,

Rebecca M. Baker

cc: Court file

APPENDIX G

Superior Court of the State of Washington
For Stevens, Pend Oreille and Ferry Counties
Stevens County Courthouse - Colville
Pend Oreille County Hall of Justice - Newport
Ferry County Courthouse - Republic

Rebecca M. Baker, Judge
Department 1

Allen C. Nielson, Judge
Department 2

Evelyn A. Bell
Court Administrator

Mailing Address:
215 S. Oak, Suite 209
Colville, WA
99114-2861

Telephone:
(509) 684-7520
Spokane 777-2741, ext. 520
Fax: 509-685-0679

August 27, 2007

Mr. Paul J. Burns
Attorney at Law
One Rock Pointe
Spokane, WA 99201-2400

Mr. Michael E. McFarland, Jr.
Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910

Gentlemen:

Re: *Hale v. Wellpinit School District*
Stevens County Cause No. 2006-2-00194-8

I do appreciate your patience – and most especially that of your clients – in waiting for me to get my decision to you on the Hales' motion for reconsideration of the earlier order granting partial summary judgment and dismissing the plaintiffs' first cause of action. This cause of action was based upon the plaintiffs' claim that the defendant school district discriminated against Mr. Hale in his employment with the District on the basis of his disability, and that the District refused to accommodate his disability, in violation of Washington's Law Against Discrimination (WLAD), Chapter 49.60 RCW.

Earlier I granted the motion for summary judgment dismissing the WLAD claim because I concluded that, as a matter of law, Mr. Hale did not have a "disability" as defined under the WLAD. I then went on (both unnecessarily and wrongly, as it now appears to me) to conclude:

> [A]ssuming for the sake of argument that [Mr. Hale] was "disabled" . . . then his request for the District superintendent to intervene in some fashion could not be viewed as a request for accommodation. (Citation omitted.)

Letter decision of March 30, 2007, at 1. For the reasons which follow, I now conclude that the first part of my decision was correct. But, for what it's worth, if a disability had existed, I now see that the issue would not be whether Mr. Hale "requested" accommodation but instead whether the District had adequate *notice* from Mr. Hale of the disability, triggering the *District's* duty to engage in an interactive process to attempt to accommodate it. I still conclude that it is unnecessary for me to reach this second issue because of my decision on the first. In other words, without a showing of a "disability," the District would not have a duty to engage in any interactive process in an effort to "accommodate" that condition.

Summary of Decision

The above decision thus denying reconsideration is as a result of my conclusion, as explained more fully below, that I am bound by the Washington Supreme Court's construction of the term "disability" as set forth in *McClarty v. Totem Electric,* 157 Wn.2d 214, 222 (2006), and not SSB 5340, specifically RCW 49.60.040(25)(a)-(c), purporting to define the term "disability" in contravention of *McClarty*'s definition. The Legislature's attempt to make the RCW 49.60.040(25) definition retroactive to the date of the *McClarty* decision fails. The statutory definition under RCW 49.60.040(25) can only be prospectively applied.

As I previously concluded, then, the undisputed facts viewed in the light most favorable to the plaintiffs do not give rise to a claim that Mr. Hale was "disabled" under the WLAD because of the *McClarty* court's judicial construction of the term "disability" – a term which had, prior to *McClarty,* appeared in RCW 49.60.010 *et seq.* without further specific definition. As you know, this *McClarty* definition requires Mr. Hale to show that his anxiety and/or depression conditions substantially limited his ability to perform a major life activity, consistent with federal ADA interpretations of the term "disability." As I previously concluded, it is undisputed that neither his sleep nor his work activities (the only "life activities" on which there was any claim of an effect) were sufficiently affected to survive a dismissal on summary judgment. See my March 30, 2007, letter decision, at page 1 for citations.

Analysis

My decision denying reconsideration is based on the analysis of whether SSB 5340's attempt to define "disability" differently than *McClarty* did and to make that definition apply retroactively to the date of the *McClarty* decision violates the separation of powers doctrine.

In our state, the presumption is that legislative amendments apply prospectively. *In Re Stewart,* 115 Wn.App. 319, 332 (2003). There are three exceptions, one of which is if the legislative intended it to apply retroactively, another is if the legislation was "curative," and the last is if the amendment was "remedial" in nature. But even if a legislative amendment is all of these, the retroactive application may not "run afoul of any constitutional prohibition," such as separation of powers principles. *McGee Guest Home, Inc., v. DSHS,* 142 Wn.2d 316, 325 (2000) (citations omitted).

Here, I conclude that the definition of "disability" enacted as a new subsection of the

definitions section of Chapter 49.60 (added by SSB 5340 as RCW 49.60.040(25)(a) – (c)) – despite the Legislature's stated intent that it be "retroactive" and "remedial" -- cannot be applied retroactively because it is not merely remedial. And, to allow its retroactive application would violate the separation of powers doctrine of the Constitution. Here, it matters little that the amendment might be remedial or curative, because even if it were, it would violate the separation of powers doctrine because it "contravenes a previous [appellate] judicial construction of the statute." *State v. Posey*, 130 Wn.App. 262, 274 (2005) (citations omitted).

An amended statute is "curative or remedial if it clarifies or technically corrects an ambiguous statute without changing prior case law constructions of the statute." *Barstad v. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 537 (2002). In light of the decision in *McClarty,* SSB 5340 does not merely "afford a remedy, or better or forward remedies already existing for the enforcement of rights and redress of injuries." *Bayless v. Community College District No. XIX,* 84 Wn.App. 309, 312 (1997) (citations omitted). Rather, SSB 5340 "creates a new obligation, imposes a new duty, or attaches a new disability" beyond what was allowed by the Supreme Court's decision in *McClarty,* as was the case in, for example, *Hammack v. Monroe Street Lumber Co.,* 54 Wn.2d 224, 229 (1959) (citations omitted).

Directly on point is the holding in *American Discount v. Shepherd,* 129 Wn.App. 345 (2005). Because the judiciary had interpreted the prior statute to disallow the remedy to the particular class of persons to which the amendment wished to extend the remedy, the amended statute could not be applied retroactively.

Here, the SSB 5340 definition of "disability" would extend the WLAD's protections to a larger class of individuals than what the *McClarty* court judicially construed the definition of "disability" to include. It therefore violates the separation of powers doctrine to apply the amended legislative definition of "disability" retrospectively.

Reconsideration must therefore be denied.

Other Matters

On another note, in response to Mr. McFarland's letter of August 17, 2007, I wanted to confirm what I passed on through the Court Administrator: that, as you both requested, your October 15, 2007, trial date will be stricken. This is of court partly because of the delays I have caused you in getting this decision to you and your resulting concerns about having to prepare for trial without benefit of my decision until now. But also, the reality is that we have had to schedule a two-week first degree murder trial in Pend Oreille

County ahead of you for those October dates, making a trial date for your case unlikely for then in any event.

I would ask that Mr. McFarland prepare the necessary order on the reconsideration decision and circulate it to Mr. Burns for approval as to form before presenting it to me for entry. Also, if you would both please get on the line together and call our Court Administrator, Evelyn Bell, to schedule a new trial date, I'd appreciate it.

Very truly yours,

Rebecca M. Baker

Rebecca M. Baker

cc: Court file

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT DELAPLAINE,

Plaintiff,

v.

UNITED AIRLINES, INC.

Defendant.

No. C06-0989Z

ORDER

THIS MATTER came before the Court on the parties' cross-motions for partial summary judgment. The Court heard argument and orally ruled on the pending motions. Minutes of Sep. 21, 2007 (docket no. 68). The Court issues this Order to provide further explanation of its decision concerning the definition of disability to be applied in this case.

Background

On September 11, 2001, plaintiff injured his right knee while working as a cabin serviceman for United Airlines, Inc. ("United"). The parties agree that, as a result of his injury and perhaps due to a degenerative joint disease, plaintiff was eventually deemed unable to perform the duties of a cabin serviceman. *See* Exhs. 4 & 7 to Luppert Decl. (docket no. 21); Exh. 24 to Delaplaine Dep., Exh. 1 to Tift Decl. (docket no. 45). Plaintiff's employment with United ended when he was placed on layoff status effective July 22, 2003.

Exh. 9 to Luppert Decl. (docket no. 21). Plaintiff had been advised via letter dated June 30, 2003, that, due to "significant business uncertainty" and based on his level of seniority, he could elect between (i) layoff with the right of recall and (ii) transfer to a station having permanent openings or junior employees subject to displacement. *Id.* Plaintiff opted for layoff, indicating on the form that transfer to Chicago, the only available option for a cabin serviceman position, was not viable in light of his permanent restrictions due to his knee injury. *Id.* Except for a two- to three-week period in 2006, plaintiff has not worked for any employer since exacerbating his knee injury in September 2002. Delaplaine Decl. at 20-22, Exh. 1 to Tift Decl. (docket no. 45).

Discussion

Plaintiff brings this suit under the Washington Law Against Discrimination ("WLAD"), RCW Chapter 49.60. The WLAD constitutes an exception to the general rule that an employer may terminate an employee for good cause, no cause, or even morally wrong cause; the statute prohibits discrimination in hiring or discharge on the basis of race, gender, disability, or other enumerated characteristic. *McClarty v. Totem Elec.*, 157 Wn.2d 214, 221, 137 P.3d 844, 847 (2006). Under the WLAD, a person with disability may present claims under two different theories: (i) disparate treatment; and (ii) failure to accommodate. *Id.* at 221, 137 P.3d at 848; *see also Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 640, 9 P.3d 787, 793 (2000). Plaintiff here bases his action solely on United's alleged failure to accommodate. *See* Complaint at ¶¶ 7-9, Exh. A to Notice of Removal (docket no. 1).

To prevail at trial, plaintiff must prove that he was "disabled" within the meaning of the WLAD and that United failed to meet its obligation to reasonably accommodate his disability. *Pulcino*, 141 Wn.2d at 640, 9 P.3d at 793. With respect to the issue whether plaintiff has a disability, the parties dispute which of two standards applies. On July 6, 2006, the Washington Supreme Court adopted the definition of disability outlined in the Americans with Disabilities Act of 1990 ("ADA"). *McClarty*, 157 Wn.2d at 228, 137 P.3d at 851. At

the time *McClarty* was decided, the WLAD did not define the term "disability." *Id.* at 222, 137 P.3d at 848. The Washington State Human Rights Commission ("HRC"), however, had promulgated a regulation stating that a "condition is a 'sensory, mental, or physical disability' if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question." *Id.* at 223, 137 P.3d at 848 (quoting WAC 162-22-020). The Supreme Court concluded that the HRC's definition was circular and unworkable,[1] and rejected it in favor of the ADA's provision, which indicates that a disability is "a physical or mental impairment that substantially limits one or more of [the individual's] major life activities." *Id.* at 223-228, 137 P.3d at 849-51; *see also* 42 U.S.C. § 12102(2)(A).

The Washington legislature acted swiftly to indicate disagreement with the *McClarty* decision.[2] In May 2007, Senate Bill No. 5340 was approved, and was expressly made retroactive to all causes of action occurring before July 6, 2006 (the date of the *McClarty* decision), and to all causes of action occurring after the effective date of the act, July 22, 2007. Laws of 2007, ch. 317, § 3. Disability is now statutorily defined as "a sensory, mental, or physical impairment that: (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact." RCW

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[1] Although perhaps circular, the HRC's definition was aimed at avoiding "a battlefield for conflicting definitions" of handicap or disability. *McClarty*, 157 Wn.2d at 246, 137 P.3d at 860 (Owens, J., dissenting). Instead of assessing whether a person falls within some abstract definition of handicapped or disabled, the HRC regulation focused on the issue whether "the worker has any 'sensory, mental, or physical' condition which the employer uses as a basis for rejecting him (or her) even though that individual may be perfectly capable of properly performing the work." *Id.* (quoting Attorney General Slade Gorton, Brief of Appellant at 44-45, *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1977) (No. 44105)).

[2] *See* Laws of 2007, ch. 317, § 1 ("The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric* . . . , failed to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.").

49.60.040(26)(a). The new legislation clarifies that a disability may be temporary or permanent, need not limit the ability to work generally or at a particular job, and need not limit any other activity within the scope of the WLAD. RCW 49.60.040(26)(b).

The new definition of disability further provides that, "for the purposes of qualifying for reasonable accommodation in employment," an impairment "must have a substantially limiting effect upon the individual's ability to perform his or her job." RCW 49.60.040(d)(i). In the alternative, an employee can prove his or her case by (i) showing that the employer was put "on notice of the existence of an impairment," and (ii) providing medical documentation that establishes "a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(26)(d)(ii). Thus, unlike the ADA, the WLAD, as amended, does not require that a disability substantially limit a major life activity, but only that it substantially limit the ability to perform one's job, before a right to accommodation arises.

The parties disagree concerning exactly when plaintiff's cause of action accrued, but they do not dispute that it existed prior to the *McClarty* decision. Moreover, the parties are in accord that, if the Court applies the new definition codified in RCW 49.60.020(26), plaintiff is "disabled" for purposes of the WLAD. On the other hand, as indicated in its oral ruling, the Court concludes that, under the *McClarty* or ADA definition of disability, a genuine issue of material fact would preclude summary judgment in favor of either party.

United contends that the retroactivity clause of Senate Bill No. 5340 violates the separation of powers doctrine and is therefore unconstitutional. The Court disagrees.[3] A

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[3] Pursuant to Fed. R. Civ. P. 5.1(b), the Court notified the Washington State Attorney General that a constitutional challenge has been raised in this matter. Order dated Sep. 14, 2007 (docket no. 56). The Court, however, need not wait for the 60-day intervention period to expire before ruling against United's position. *See* Advisory Committee Notes to Fed. R. Civ. P. 5.1 ("The court may reject a constitutional challenge to a statute at any time.").

legislative amendment is presumed to operate prospectively unless (i) the legislature intended it to apply retroactively, (ii) the amendment is curative, or (iii) the amendment is remedial. *In re Stewart*, 115 Wn. App. 319, 332, 75 P.3d 521, 528 (2003). Under the separation of powers doctrine, an amendment cannot be given retroactive effect if the new legislation contravenes a judicial decision that "authoritatively construes statutory language." *Id.* at 335, 75 P.3d at 529. A statute does not, however, operate retroactively simply because a court applies it to a case involving conduct antedating its effective date; rather, the issue is whether the new law attaches "new legal ramifications to events completed before the statute's enactment." *In re Fox*, 138 Wn. App. 374, 389, 158 P.3d 69, 76 (2007). "A statute that clarifies, rather than alters, a current law does not operate retroactively even when applied to transactions conducted before its enactment." *Id.*

Senate Bill No. 5340 does not actually contravene *McClarty*. The legislature appears to have carefully selected the effective dates for the new definition of disability. The initial draft of the legislation contained the following language: "This act is remedial and retroactive and shall apply to all claims which are not time barred, as well as all claims pending in any court or agency at the time of enactment." S.B. 5340, 60th Leg., Reg. Sess. § 3 (Wash. 2007), Exh. 1 to Tift Supp. Decl. (docket no. 62). The parties agree that the original text of the bill would have been unconstitutional. As passed, however, the legislative amendment was made applicable to cases arising before the *McClarty* decision, and to cases arising after the effective date of the legislation. Laws of 2007, ch. 317, § 3. Thus, cases arising between the date of the *McClarty* decision and July 22, 2007, are still governed by *McClarty*.

Moreover, Senate Bill No. 5340 does not attach new legal ramifications to pre-existing events. In requiring proof that a disability substantially limits a major life activity, the *McClarty* Court did not interpret an existing Washington statute, but rather imported a definition from a different source, namely federal law. As recognized in *McClarty*, until the

Supreme Court issued its decision in that case, the Washington legislature had "never found it necessary to define the terms 'handicap' or 'disability.'" 157 Wn.2d at 222, 137 P.3d at 848. As noted by the dissent in *McClarty*, the legislature had known, since the passage of the ADA, that the HRC's regulatory definition of disability was broader than under federal law, and the legislature had "clearly acquiesced in the Commission's definition." *Id.* at 244, 137 P.3d at 859 (Owens, J., dissenting).

In addition, judicial opinions predating *McClarty* had applied, in the failure to accommodate context, virtually the same definition eventually adopted by the legislature after *McClarty*. *See, e.g., Pulcino*, 141 Wn.2d at 641, 9 P.3d 794 ("an accommodation claimant satisfies the 'handicap' element of his or her claim by proving that (1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his or her job"). Indeed, in *Pulcino*, the Washington Supreme Court specifically declined to adopt the ADA definition of disability, observing that, unlike the WLAD, the ADA focuses on the duration of the disability. *Id.* at 641 n.3, 9 P.3d at 794 n.3. Thus, at least with regard to a failure to accommodate claim, like the one at issue here, RCW 49.60.040(26) simply returns matters to their status pre-*McClarty*.

The Court therefore holds that the retroactive application of Senate Bill No. 5340 does not violate the separation of powers doctrine. *See Breeden v. Kaiser Alum. & Chem. Corp.*, 2007 WL 1461290 (E.D. Wash.) (holding that Senate Bill No. 5340 applied retroactively because it was predominantly remedial and did not affect a substantive or vested right). As indicated in the Court's oral ruling, based on the definition of disability codified in RCW 49.60.040(26), no genuine issue of material fact exists, and plaintiff is entitled to partial summary judgment. The Court rules, as a matter of law, that plaintiff is "disabled" within the meaning of the WLAD.

The Clerk is directed to send a copy of this Order to all counsel of record, as well as to Maureen Hart, Solicitor General, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100.

IT IS SO ORDERED.

DATED this 28th day of September, 2007.

Thomas S. Zilly
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RANDALL VARGA

Plaintiff(s),

v.

STANWOOD-CAMANO SCHOOL DISTRICT

Defendant(s).

NO. C06-178MJP

ORDER CLARIFYING APPLICABLE LAW RE: DEFINITION OF DISABILITY

This matter comes before the Court on Defendant's motion for an order clarifying the applicable law in this action. Defendant requests an order clarifying that (1) the applicable law in the present case is the definition of "disability" adopted by the Washington State Supreme Court in McClarty v. Totem Electric, 157 Wn.2d 214 (2006), and (2) the applicable law is not the new definition of "disability" in S.B. 5340 passed by the Washington State Legislature on April 22, 2007, and explicitly made retroactive to cases occurring before July 6, 2006. (Dkt. No. 45.) The Court, having received and reviewed the motion, response (Dkt. No. 49), reply (Dkt. No. 52), all documents submitted in support thereof, and the record, concludes that the applicable law in this case is the definition of "disability" provided by the Washington Supreme Court in the 2006 McClarty decision and not the new definition of "disability" in S.B. 5340.

Background

Randall Varga ("Varga") brought a diversity action against his former employer, the Stanwood-Camano School District ("District"), for failure to accommodate his disability, and exacerbation of his disability by their failure to accommodate in violation of Washington Law Against

Discrimination ("WLAD"), RCW 49.60. (Compl.¶1.1.) In addition to this discrimination claim, Varga also states a retaliation claim. (Compl.§ 6.) The District argues that Varga was not "disabled" within the meaning of the WLAD and therefore not entitled to accommodation. (Def.'s Mot. at 3.)

Varga's lawsuit was filed on February 3, 2006, in federal court based on diversity of citizenship. (Compl.¶1.1.) On July 6, 2006, the Washington Supreme Court issued a seminal opinion, McClarty v. Totem Electric, 157 Wn.2d 214, 228 (2006), in which it defined the term "disability" for purposes of a state-law discrimination claim and adopted the definition of disability set forth in the federal Americans with Disability Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12209.

On April 22, 2007, the Washington legislature passed new legislation—referred to as S.B. 5340 —that defines "disability" in the WLAD. S.B. 5340, 60th Leg., 2007 Reg. Sess. § 2, ¶ 25 (Wash. 2007). The bill was signed into law by the Governor of Washington on May 4, 2007. Washington State Legislature, http://www.leg.wa.gov/legislature/ (last visited July 27, 2007). The parties agree that the legislature's definition of "disability" in S.B. 5340 and the definition in McClarty are different. (Def.'s Mot. at 1; Plf.'s Resp. at 2.)

The legislature also made S.B. 5340 explicitly retroactive: "This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006." S.B. 5340 § 3. Because Varga's lawsuit was filed on February 3, 2006, Plaintiff argues that S.B. 5340 applies to this case. Defendant concedes that under the plain language of S.B. 5340, this case is governed by the new law.

Discussion

Defendant claims that retroactive application of S.B. 5340 to this case would violate the Washington separation of powers doctrine because it overrides the Washington Supreme Court decision in McClarty. Defendant argues that the applicable law is the definition of "disability" in the McClarty decision, and not the definition in SB 5340. Plaintiff argues that no separation of powers

issue is presented because the legislature is empowered to amend a statute in response to judicial interpretations. Plaintiff argues that the applicable law is the definition in S.B. 5340. An analysis of this motion comprises two steps: first, whether the McClarty decision actually contravenes S.B. 5340, and if so, second, whether legislation that contravenes a prior judicial decision is unconstitutional under Washington law.

I. THE RETROACTIVE LAW CONTRAVENES A PREVIOUS JUDICIAL DECISION

A. McClarty adopted the federal definition of "disability"

The McClarty Court adopted the definition of disability set forth in the ADA. 157 Wn.2d at 228. Under McClarty's definition, a plaintiff bringing suit under the WLAD establishes that he has a disability by showing that he has (1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such impairment, or (3) is regarded as having such impairment. Id.; see also 42 U.S.C. §§ 12101-12209.

However, the McClarty Court did not explain whether temporary disabilities will be considered "disabilities" under this definition. Whether a temporary disability qualifies as a "disability" is a material issue in the present case because Defendant argues that Varga's disability was temporary. (Def.'s Mot. at 3.) The parties appear to assume that the McClarty definition precludes temporary disabilities. (Id.; see also Plf.'s Resp.)

Defendant correctly asserts that McClarty places the burden on Plaintiff to show that his impairment "substantially limited" a "major life activity." Under the plain language of the McClarty definition, Plaintiff must show that he has a "physical or mental impairment that substantially limits one or more of his major life activities." 157 Wn.2d at 228.

B. The Washington Legislature rejected the McClarty definition of "disability"

The new law explicitly rejects both (1) the McClarty Court's adoption of the federal ADA definition of "disability," and (2) the burden that the McClarty decision placed on a plaintiff to show that his impairment "substantially limited" a "major life activity." Section 1 of S.B. 5340 states:

> The legislature finds that the supreme court, in its opinion in McClarty v. Totem Electric, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.

The law also provides that a disability exists "whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity." Id. By explicitly rejecting the ADA definition and the burden placed on the plaintiff to show that his impairment "substantially limited" a "major life activity," S.B. 5340 overrides the McClarty Court's decision to adopt the ADA definition.

II. A RETROACTIVE LAW THAT CONTRAVENES A PRIOR JUDICIAL DECISION IS UNCONSTITUTIONAL UNDER WASHINGTON LAW

A. The legislature intended S.B. 5340 to be retroactive

Washington law presumes that statutory amendments apply only prospectively. American Discount Corp. v. Shepherd, 129 Wn.App. 345, 353 (2005) (citing In re Pers. Restraint of Stewart, 115 Wn.App. 319, 332 (2003)). But the presumption is overcome, and a statutory amendment will apply retroactively, in any of the following three instances: 1) if the legislature intended retroactivity, 2) if the amendment is curative, or 3) if the amendment is remedial. American Discount, 129 Wn.App. at 353 (citing Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536-7 (2002)); Stewart, 115 Wn.App. at 332. The plain language of S.B. 5340 establishes that the Washington legislature intended retroactivity: "This act is remedial and retroactive, and applies to all causes of action occurring before

July 6, 2006." S.B. 5340 § 3. The presumption that S.B. 5340 applies only prospectively is overcome because the legislature intended retroactivity.

B. Legislative intent for retroactivity notwithstanding, a retroactive law that contravenes a prior judicial decision violates the Washington separation of powers doctrine

Notwithstanding express legislative intent, a statutory amendment will not apply retroactively if it violates a constitutional prohibition. American Discount, 129 Wn.App. at 355 (citing Stewart, 115 Wn.App. at 337); see also In re F.D. Processing, Inc., 119 Wn.2d 452 (1992) (noting that under Washington law, the legislature may pass laws with retroactive application only in limited circumstances). Although not expressly enumerated in Washington's Constitution, the doctrine of separation of powers derives from the division of government into three branches. Id.; see also State v. David, 134 Wn.App. 470 (2006). The legislature violates the separation of powers doctrine when it passes retroactive legislation that contradicts prior judicial construction of a statute. Stewart, 115 Wn.App. at 335 (holding that retroactive contravention of court violates separation of powers); State v. Posey, 130 Wn.App. 262, 274 (2005), review granted 158 Wn.2d 1009 (2006) (noting that to allow the legislature to "overrule" the judiciary would raise separation of powers problems). For example, in Stewart, the Court of Appeals refused to apply retroactive legislation that overruled a previous construction of a statute by the courts. 115 Wn.App. at 337. The court examined amendments to the Sentencing Reform Act ("SRA") that overruled the court's previous interpretation of that statute. See Id. at 329-32. In a decision previous to Stewart, the court of appeals had determined that the Department of Corrections ("DOC") lacked authority to require an offender to submit a pre-approved residence and living arrangement before being released. In re Pers. Restraint of Capello, 106 Wn.App. 576, 583 (2001). In response to Capello, the Washington legislature amended the SRA to clarify that DOC had authority to impose such a condition, and retroactively applied the clarification. Id. at 578.

The Stewart court held that the SRA amendments did not apply retroactively despite legislative intent, because to do so would violate the separation of powers doctrine by allowing the legislative branch to retroactively overrule a judicial decision. 115 Wn.App. at 322-23.

Plaintiff argues that Washington law allows for the retroactive application of S.B. 5340 relying upon Marine Power & Equipment Co. v. WA State Human Rights Commission Hearing Tribunal, 39 Wn.App. 609, 615 (1985) in which the court held that, although the legislature may not retroactively overrule a prior judicial opinion construing a statute, if the statute amends, rather than clarifies the extant statute, then the new statute applies retroactively. Marine Power held that statutory amendments authorizing damages limited to $1,000 for humiliation and suffering resulting from discrimination applied retroactively, even though the amendments contravened a prior judicial decision. See 39 Wn.App. at 616-20. Plaintiff argues S.B. 5340 is an "amendment," and that under the Marine Power rubric, S.B. 5340 applies retroactively.

However, Marine Power does not support Plaintiff's argument. In Marine Power, the legislature's response to the prior judicial decision was "... to add a remedy, rather than to clarify prior intent ..." and therefore, the law at issue "amend[ed], rather than clarifi[ed], the original statute." 39 Wn.App. at 616. Here, S.B. 5340 clarifies that McClarty "failed to recognize that the Law Against Discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990." S.B. 5340 § 1. Because S.B. 5340 clarifies the prior intent of the WLAD, explaining that the WLAD was intended to provide broader protections than the federal ADA, Marine Power is distinguishable and does not support Plaintiff's position.

C. Retroactive amendments are not "remedial" if they contravene prior judicial decisions

Plaintiff argues that S.B. 5340 applies retroactively because it is a "remedial" amendment. Plaintiff points to a recent decision from the Eastern District of Washington, in which the court relied

on Marine Power in holding that S.B. 5340 retroactively applies to an employee's disability claims. See Breeden v. Kaiser Aluminum & Chemical Corp., No. CV-05-363-LRS, 2007 WL 1461290, at *2 (E.D. Wash. May 16, 2007). The Breeden court exclusively relied on Marine Power for the proposition that if "the amendment changes or amends an existing statute and is remedial as defined by case law, such legislative action is permissible." Id. The Breeden court found that S.B. 5340 was "remedial" and held that the applicable law was the retroactive amendment, and not the McClarty decision. Id.

The Breeden court's exclusive reliance on the 1985 Marine Power decision neglects more recent Washington Supreme Court and Court of Appeals decisions. These decisions have held that retroactive amendments are only remedial if they do not contravene prior judicial decisions. See Tomlinson v. Clarke, 118 Wn.2d 498, 510-511 (1992) ("When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive.")(emphasis added); see also Barstad v. Stewart Title Guaranty Co., Inc., 145 Wn.2d 528, 537 (2002) ("An amendment is curative and remedial if it clarifies or technically corrects an ambiguous statute without changing prior case law constructions of the statute.")(emphasis added); Stewart, 115 Wn.App. at 336-37. The Breeden court held that S.B. 5340 is "remedial," but did not consider whether the amendment contravenes McClarty. This Court is not bound by Breeden and does not find it persuasive.

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Conclusion

Retroactive legislation that contravenes a prior judicial decision violates the separation of powers doctrine. Because S.B. 5340 contravenes McClarty, it violates the Washington separation of powers doctrine, and applies only prospectively. The applicable law in this case is the definition of "disability" provided by the Washington Supreme Court in the 2006 McClarty decision and not the definition in S.B. 5340.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: July 27, 2007.

/s Marsha J. Pechman

Marsha J. Pechman
United States District Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 30 day of October, 2007, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Michael E. McFarland Evans, Craven & Lackie 818 West Riverside, Suite 250 Spokane, WA 99201-0910	____ VIA REGULAR MAIL ____ VIA CERTIFIED MAIL __X__ HAND DELIVERED ____ BY FACSIMILE ____ VIA FEDERAL EXPRESS

PAUL J. BURNS

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